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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 JOHN L. BENNETT,

9 Petitioner,

10 v.

11 WARDEN WENGLER,

12 Respondent.  
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Case No. C09-5027BHS

ORDER DENYING PETITIONER'S  
MOTION TO APPOINT COUNSEL,  
STRIKING PETITIONER'S MOTION  
FOR AN EVIDENTIARY HEARING,  
STRIKING PETITIONER'S MOTION  
FOR A NEW TRIAL, OVERRULING  
PETITIONER'S OBJECTIONS, AND  
ADOPTING REPORT AND  
RECOMMENDATION

16 This matter comes before the Court on the Report and Recommendation of the  
17 Honorable J. Richard Creatura, United States Magistrate Judge (Dkt. 18), Petitioner's  
18 Objections to the Report and Recommendation (Dkt. 20), Petitioner's Motion to Appoint  
19 Counsel (Dkt. 17), Petitioner's Motion for Evidentiary Hearing (Dkt. 19), and Petitioner's  
20 Motion for New Trial (Dkt. 21)..

21 **A. Motion to Appoint Counsel**

22 Under 28 U.S.C. § 1915(e)(1), the Court may request an attorney to represent any  
23 person unable to afford counsel. The Court has discretion to appoint counsel in exceptional  
24 circumstances. *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). To find  
25 exceptional circumstances, the court must evaluate the likelihood of success on the merits  
26 and the ability of the petitioner to articulate the claims pro se in light of the complexity of  
27 the legal issues involved. *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

1 In this case, Petitioner is able to articulate his claims and raise issues before the Court.  
2 Moreover, Petitioner has not shown that he is likely to succeed on the merits of the case.  
3 Therefore, the Court denies Petitioner's motion for appointment of counsel.

4 **B. Report and Recommendation**

5 On June 16, 2009, Judge Creatura issued a Report and Recommendation on Petitioner's  
6 Petition for Writ of Habeas Corpus. Dkt. 18. Judge Creatura recommends that the Court  
7 deny Petitioner's ineffective assistance of counsel claim because the claim is "procedurally  
8 defaulted and should not be considered or addressed on the merits." *Id.* at 6-8. Judge  
9 Creatura also recommends that the Court deny Petitioner's Fourth Amendment illegal search  
10 and seizure claim because Petitioner had a full and fair opportunity to litigate this issue in  
11 state court. *Id.* at 8-10.

12 On July 10, 2009, Petitioner filed objections to the Report and Recommendation. Dkt.  
13 20. Petitioner argues that it would be a fundamental miscarriage of justice to deny his  
14 ineffective assistance of counsel claim because of a procedural bar. Dkt. 20 at 7. However,  
15 enforcing a procedural bar is not a fundamental miscarriage of justice. Petitioner's argument  
16 is without merit. Moreover, Petitioner has failed to rebut Judge Creatura's finding that  
17 "Petitioner here cannot show cause and prejudice in state court." Dkt. 18 at 7. Therefore,  
18 the Court overrules Petitioner's objections on this claim for relief.

19 With regard to Petitioner's Fourth Amendment claim, he argues that the claim "is  
20 refiled under newly discovered evidence and has not been afforded a full and fair  
21 opportunity to litigate [it] in the state court." Dkt. 20 at 7-8. The Court disagrees and adopts  
22 Judge Creatura's recommendation that the federal court is precluded from hearing  
23 Petitioner's claim under *State v. Powell*, 428 U.S. 465 (1976). Therefore, Petitioner's  
24 objections are overruled on this claim for relief.

25 The Court overrules Petitioner's objections and adopts Judge Creatura's Report and  
26 Recommendation. This matter shall be dismissed.

1 **C. Motions for Evidentiary Hearing and New Trial**


2 On July 6, 2009, Petitioner file a motion for an evidentiary hearing. Dkt. 19. On July  
3 10, 2009, Petitioner filed a motion for a new trial. Dkt. 21. Because the Court adopts Judge  
4 Creatura's recommendation to dismiss Petitioner's Petitioner for Writ of Habeas Corpus, the  
5 Court will strike both of these motions as moot.

6 **D. Order**

7 Therefore, the Court having considered the Report and Recommendation, Petitioner's  
8 objections, and the remaining record, does hereby find and order:

- 9 (1) The Court **OVERRULES** Petitioner's Objections (Dkt. 20);  
10 (2) The Court **ADOPTS** the Report and Recommendation(Dkt. 18); and  
11 (3) The Petition for Writ of Habeas Corpus (Dkt. 1) is **DISMISSED**.

12 DATED this 13<sup>th</sup> day of August, 2009.

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16 BENJAMIN H. SETTLE  
17 United States District Judge  
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